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ABSTRACT

An important area of mass communication studies concerns legal limitations placed on public access to decisions made by state-funded organizations. Though all 50 states and the Congress have enacted statutes allowing public access to government records, universities in some states have won court battles to protect documents concerning presidential searches. In at least eight states there have been court battles over this issue. In the Harte-Hanks case in Texas, a court ruled that Texas A&M must release the names of all the applicants except the finalists. In a 1991 case, the Arizona Supreme Court ruled that Arizona State University must release the names of only those who were being seriously considered for the job; the other candidates could remain secret. Despite these inconsistencies, there is substantial agreement among the decisions, which demonstrates the difficulty applicants and university administrators have had in convincing the courts to close university presidential searches. The prevalent arguments--that applicants are exempted by either personnel matters or personal privacy exemptions--have not succeeded, and are not likely to succeed in other states. The challenges that public records law poses to university presidential searches demonstrate that the public's right to access to the search process outweighs the privacy interests of applicants. However, several states have enacted legislation closing search committee records. Legislative changes to state public record laws remain a significant threat. (Contains 83 notes.) (TB)

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Scaling the Ivory Tower:
State Public Records Laws and University Presidential Searches

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Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches

I. Introduction

As American government has grown in both size and scope, its citizens increasingly have sought access to the decision-making process.[1] However, a constitutional right of access has never extended beyond the public's right to attend judicial proceedings.[2] The expansion of public access to government records and meetings thus can be attributed to statutory rather than constitutional law. Today all fifty states and the federal Congress have enacted statutes allowing public access to government records.[3]

These statutes require that most records created by government agencies are open to public inspection. There is little doubt that most states include public institutions of higher learning within the definitions of their public records laws.[4] The scope of public records laws in the university setting, however, remains largely unsettled.

Perhaps no decision-making process better illustrates the painful transition to open government in higher education than the search committee formed to select a university president. Once conducted behind closed doors by a handful of university trustees, presidential searches occur today in a climate of constituency participation.[5] Considered by the general public as no less than the personification of the

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[1] Harold Cross, *The People's Right to Know*, 180-83 (1953).

[2] 448 U.S. 555 (1980).

[3] For a detailed analysis of all 50 state statutes, see Reporters Committee for Freedom of the Press, *Tapping Officials' Secrets*, Washington, D.C. (1993).

[4] At least 30 state courts of last resort have ruled that universities are public agencies. See *Tapping Officials' Secrets*, Reporter's Committee for Freedom of the Press, Washington, D.C. (1993).

[5] Judith B. McLaughlin, "From Secrecy to Sunshine: An Overview of Presidential Search Practice," 22 Research in Higher Education 195, 196 (1985).

institution itself, the university president must appeal to a diverse community often filled with competing interests.[6] Today these competing social and political interests demand input into the presidential selection process, furthering the public interest in disclosure.

Opponents of open searches, including many university administrators, argue that open searches frustrate the university's ability to attract all potential candidates.[7] They emphasize the need for search committees to deliberate frankly and to insulate the early stages of decision-making from political pressure, and argue that open proceedings and records "chill" discussion of controversial topics. Opponents also argue that access laws impair the efficient administration of the university.

Courts historically deferred to the expertise of university administrators on matters of institutional self-governance, in recognition of the university's need for independence in order to fulfill its academic mission.[8] Although created by the state legislature and funded with taxpayer dollars, public universities and colleges historically were viewed as unique quasi-governmental bodies with their own rules of secrecy and public accountability.[9] In addition, courts have guaranteed individual academic freedom for university

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[6] Clark Kerr and Marian L. Gade, *The Guardians: Board of Trustees of American Colleges and Universities, What They Do and How Well They Do It*. Washington, D.C.: Association of Governing Boards of Universities and Colleges (1990).

[7] Harlan Cleveland, *The Costs and Benefits of Openness: Sunshine Laws and Higher Education*, Association of Governing Boards of Universities and Colleges, Washington, D.C. (1985).

[8] Judith B. McLaughlin, *Confidentiality and Disclosure in the Presidential Search*, Unpublished Ph.D. dissertation, Harvard University, Cambridge, Mass. (1983).

[9] Frank A. Vickory, "The Impact of Open-Meetings Legislation on Academic Freedom and the Business of Higher Education," 24 *Amer. Bus. L.J.* 427 (1986).

personnel.[10] The emergence of public records and meetings laws thus set the stage for inevitable conflict between the doctrines of institutional and individual autonomy and public access.[11]

This paper will examine the state court decisions and legislative enactments concerning the application of public records statutes to university presidential searches. The paper will outline the conflict between the privacy interests inherent in university presidential searches and disclosure required by state public records laws by discussing state court decisions on the issue. The discussion of legal issues presented in the cases should aid administrators, members of the press and interested members of the public in states where the issue remains unsettled to determine whether university search records presumably are open or closed. The paper also will analyze the potential for open presidential searches in other states.

I. Applying Public Records Laws to University Presidential Searches

While public records laws differ in what they command and exclude, they have generally been held to include public colleges and universities.[12] Courts have struggled, however, with the depth of coverage

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[10] The U.S. Supreme Court outlined the concept of individual academic freedom in several important decisions. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); Keyishan v. Board of Regents, 385 U.S. 589 (1967).

[11] For commentary on the application of public access laws to the university in general, see Cleveland, supra note See also Nancy E. Shurtz, "The University in the Sunshine: Application of the Open Meeting Laws to the University Setting," 5 J. Law & Educ. 453 (1976).

[12] *See, e.g.*, Rosenberg v. Arizona Board of Regents, 118 Ariz. 489, 578 P.2d 168 (Ariz. 1978) (Board of Regents and tuition appeal committee of the state university are bodies within the meaning of the open meetings law); Wood v. Marston, 442 So.2d 934 (Fla. 1983) (when a decision-making authority is delegated to a faculty committee, that committee is then subject to the Florida Sunshine Law); Wisconsin Office of the Attorney General, Opinion No. 2-25 (1977) (University of Wisconsin committee meetings in which power is limited to voting on recommendations and in which final decision-making power rests in the board of

of public records laws -- in other words, with how deeply within the hierarchy of the institution the laws apply. Most public records laws do nothing to resolve the conflict because they fail to explicitly include or exempt universities from their provisions.[13] Applying open records statutes to institutions of higher learning therefore requires the judiciary to review university policies and practices to determine whether "governing bodies" or "state agencies" are involved,[14] whether "public records" are produced,[15] whether "public funds" are spent,[16] or to apply other subjective tests to determine whether the records are protected from disclosure by certain statutory exemptions.

Litigation over the ability of public universities to withhold records of their presidential search committees from public scrutiny has arisen in at least eight states with widely disparate results. Faced in each instance with a conflict between the university's interest in confidentiality and the public interest in access to information, courts generally have interpreted the public records law broadly to provide public access to university search records. However, most courts also have called upon the legislature to decide which policy ultimately should prevail.

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regents are still covered by the sunshine law); *but also see* California Office of the Attorney General, 64 *Opinions of the Attorney General* 875 (Dec. 11, 1981) (Regents of the University of California are not covered by public access laws); Kentucky Office of the Attorney General, Opinion No. 78-776 (1978) (screening committee for the president of Western Kentucky University is not a public agency according to the state access laws).

[13] Only X states expressly list colleges, universities or boards of trustees:

[14] *See, e.g.*, N.C. Gen. Stat. § 143-318.2 (Supp. 1992); Colo. Rev. Stat. § 24-72-206(6) (1993).

[15] *See, e.g.*, S.C. Code Ann. § 30-4-20(c) (Law. Co-op Supp. 1992) (defining public records as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics"); Official Code of Georgia 50-18-72(1)(a) (1993).

[16] *E.g.*, Ky. Rev. Stat. Ann. § 61.870(1) (Banks-Baldwin Supp. 1993); Ark. Code Ann. 25-19-103(1) (1992).

A Texas appellate court handed down the first decision opening presidential search records in 1983. *Hubert v. Harte-Hanks Texas Newspapers*[17] involved a newspaper's request for records during the 1981 presidential search at Texas A&M University. The search committee refused to release the candidates' names and qualifications, instead seeking an opinion on the issue from the attorney general. The attorney general ruled that the names and qualifications of candidates considered by the search committee must be disclosed, but that the committee's final recommendations on candidates to the Board of Regents were intra-agency memoranda exempted from the Texas Open Records Act.[18] Harte-Hanks filed suit when the search committee continued to resist disclosure even after the attorney general's opinion.[19]

The court in *Harte-Hanks* essentially agreed with the attorney general's opinion, ruling that although the names of all applicants submitted to a university presidential search committee must be made public, the list of finalists may be withheld as agency memoranda.[20] The court based its decision to release the names of all applicants on the common law test of personal privacy holding that information may be withheld if "it contains highly embarrassing facts which, if publicized, would be highly objectionable to a reasonable person and is not of legitimate concern to the public..."[21] The court concluded that the candidates' names were not facts of a highly embarrassing nature, and found that the public is legitimately concerned with the names and qualifications of candidates for the presidency of a state university.[22] Thus,

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[17] 652 S.W.2d 546 (Tex. App. 1983).

[18] Tex. Att'y Gen. ORD-273 (1981).

[19] 652 S.W.2d 546, at 548.

[20] *Id.* at 551.

[21] *Id.* at 549. The test was developed in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977).

[22] *Id.* at 551.

the personal privacy subsection of the personnel exemption in the Texas Open Records Act did not protect the disclosure of all applicant names and qualifications.

Interestingly, the newspaper did not challenge the search committee's contention, supported by the attorney general's opinion, that the list of finalists prepared by the search committee was agency memoranda exempted from disclosure under the Texas Open Records Act.[23] The attorney general's opinion likely would not have withstood the analysis discussed above, as the names and qualifications of finalists also do not appear to meet the common law test of privacy.[24] In addition, the public is no less concerned with the names and qualifications of finalists for the presidency of a state university than it is with candidates. It is important to note, however, that *Harte-Hanks* was superseded in 1989 by legislative amendments to the Texas Open Records Act restricting access to the names of applicants until 21 days before the final vote is taken.[25]

The Georgia Supreme Court likewise rejected a search committee's reliance on statutory exemptions to the state's public records law, only to be superseded later by the state legislature. In 1989, the Georgia Board of Regents rejected a request by the *Atlanta Journal & Constitution* for the names of candidates for the presidency of Georgia State University. *The Atlanta Journal & Constitution* then filed suit against the

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[23] *See* Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 3(a).

[24] The Texas Supreme Court has recognized in the Open Records Act a strong legislative preference for disclosure over confidentiality. *See* Hutchins v. Texas Rehabilitation Comm'n., 544 S.W.2d 802 (Tex. Civ. App. 1976, no writ).

[25] V.T.C.S. art. 6252-17(a) § 3(a) (23) excepts from required disclosure:
...the names of applicants for the position of chief executive officer of institutions of higher education, except that the governing body of the institution... must give public notice of the name or names of the finalists being considered for the position at least 21 days prior to the meeting at which final action or vote is to be taken on the employment of the individual.

board to require production of the documents.[26] The trial judge ruled in favor of the Atlanta newspapers and gave the Regents three days to disclose all documents relating to the candidates except evaluations prepared by board members and letters of recommendation written by third parties.[27] The Board of Regents was granted a stay of the lower court's order by the Georgia Supreme Court, which decided to review the newspapers' lawsuit.[28]

In *Board of Regents of the University System of Georgia v. The Atlanta Journal & The Atlanta Constitution*,[29] the Georgia Supreme Court ruled 4-3 that the Board of Regents should have disclosed records relating to the search for a new GSU president. The opinion rejected each of the regent's contentions in turn. First, the court found that the Board of Regents is a "state agency" created by the state constitution[30] and that the records sought were "public records."[31]

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[26] Board of Regents of the University System of Georgia et. al. v. The Atlanta Journal & The Atlanta Constitution, 259 Ga. 214, 378 S.E.2d 305 (Ga. 1989).

[27] 259 Ga. 214, at 215. *See also* Sam Hopkins, "Regents Fight Order To Open GSU Files," *The Atlanta Constitution*, 24 March 1989, 1(C).

[28] *Id.*

[29] 259 Ga. 214, 378 S.E.2d. 305 (1989).

[30] *Id.* at 214. The Constitution of Georgia specifies that "There shall be a Board of Regents of the University System of Georgia..." Ga. Const. Art. VIII, § IV, Par. I (a) (1983). In addition, OCGA § 20-3-20 (a) provides: "The Board of Regents is created." Finally, the court cited OCGA § 20-3-80, which refers to the "board of regents, a state agency."

[31] *Id.* at 215. The term "public records is defined in Georgia as "all documents, papers, letters, maps, books, tapes, photographs, or similar material prepared and maintained or received in the course of the operation of a public office o. agency." Given such a broad definition of public records, the determinative question in many public records cases is whether or not the body meets the definition of a "state agency." *See* Macon Telegraph Publishing Co. v. Board of Regents of the University System of Georgia, 256 Ga. 443, 350 S.E. 2d 23 (Ga. 1986).

Having determined that the search documents fell under the definition of public records, the court turned to the exemptions cited by the regents. The regents argued that the search records fell under the Georgia Open Records Act's exemption for evaluative records.[32] The court disagreed, distinguishing application materials -- prepared by the candidates themselves --from evaluative materials prepared by the board.[33]

Finally, the court rejected the Regents' argument that the privacy interests of its applicants outweighed the public interest in disclosure. Reviewing the nature of the documents involved, the court ruled that "it is not a *personal* right to privacy that is urged upon us, but rather a *corporate* preference for privacy, which is considered to be desirable for the efficacious administration of a public function."[34] Concluding that only the legislature can define the extent of permissible secrecy as to the appointment of public employees, the court ruled that neither the judicial nor the executive branch of state government can impose its own preferences upon the process.[35] As noted above, the Georgia General Assembly in 1993 amended the Open Records Act to restrict access to searches for "executive heads of state agencies," which includes university presidents.[36]

In 1991, the Arizona Supreme Court distinguished between "prospects" and "candidates" for university presidencies under the Arizona Public Records Act.[37] In *Arizona Board of Regents v. Phoenix*

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[32] The Georgia Open Records Act exempts "records that consist of confidential evaluations submitted to, or prepared by, a governmental agency and prepared in connection with the appointment or hiring of a public officer or employee... OCGA § 50-18-72 (a)(5).

[33] *Id.* at 216.

[34] *Id.*

[35] Ibid., at 218.

[36] *See* O.C.G.A. 50-18-72 (a)(7) (1993), discussed infra.

[37] Arizona Board of Regents v. Phoenix Newspapers, 167 Ariz. 254 (Ariz. 1991).

Newspapers, the regents sued the *Arizona Republic* and the *Mesa Tribune* to block the disclosure of the names of fourteen of seventeen candidates for the presidency of Arizona State University, which the newspapers had managed to obtain through other sources.[38]

The newspapers initially requested the records of all 256 candidates received by a private consultant hired to conduct the search, but later narrowed the request to the top "20 to 30" candidates.[39] Meanwhile, the consultant recommended seventeen applicants to the board, which announced in May 1989 that it had selected three finalists. The finalists' names and resumes were released, but the board refused to release the names of the other fourteen top candidates.[40] After protracted negotiations, the board released edited versions of the other fourteen resumes, which the newspapers then used to identify the candidates.

The board then filed suit against the newspapers seeking a declaratory ruling supporting its procedures; the newspapers countersued, requesting release of the names and complete records of all 256 candidates.[41] The trial court ordered the release of the names and resumes of all 256 candidates, and awarded the newspapers $35,000 in attorneys fees.[42] Both parties then appealed, and the Arizona Supreme Court ordered the case transferred to its docket as a matter of statewide importance.

The Arizona Supreme Court relied upon a federal Freedom of Information case, *Core v. U.S. Postal Service*[43], in which the Court of Appeals for the Fourth Circuit held that the FOIA did not require disclosure of unsuccessful applicants for a senior United States Postal Services Position. Citing *Core*, the

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[38] *Id.* at 256.

[39] *Id.* at 256.

[40] *Id.*

[41] *Id.* at 257.

[42] *Id.*

[43] 730 F.2d 946 (4th Cir. 1984).

Arizona court held that the regents could balance the interests of the university in selecting the best possible president with the public's right to knowledge of the selection process and the names of persons seriously considered for the position.

The court found that revealing the names of all prospects could chill the attraction of the best possible candidates for the position. Therefore, the court reversed the trial court's decision requiring the disclosure of all 256 prospects.[44] The court then distinguished prospects and candidates, defining candidates as "prospects who are seriously considered and who are interviewed for the job."[45] Because candidates have an express desire for the job, the court reasoned that they must expect the public should know they are being considered. In addition, the court found that the public's interest in knowing which candidates are being considered for the job outweighs the countervailing interests of privacy. Thus, the court upheld the portion of the trial court's decision requiring the disclosure of the final seventeen names and resumes.[46]

A dissenting justice made several cogent arguments against the majority's balancing of interests.[47] First, restricting access only to finalists for university presidencies affords the public no opportunity to determine whether a university presidential search was rigged or discriminatory. Also, restricting access prohibits the public from bringing to the attention of the Board of Regents information not generated during the search process. Most importantly, the dissent argued that only the Arizona Legislature is vested with the authority to adopt exemptions.[48] By balancing the interests of privacy and disclosure, the dissenting

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[44] 167 Ariz. 254, at 258.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 268 (J. Corcoran, dissenting).

[48] *Id* at 260.

justice argued that the majority had undertaken an exercise in legislative discretion violative of its powers under the Arizona Constitution.[49]

The University of Wisconsin Board of Regents[50] and the University of New Mexico Board of Regents[51] reached settlement agreements with media organizations seeking access to university presidential search records. While neither case established legal precedent for public access to university presidential records, in both instances the regents agreed to release the names of all applicants for university presidencies at all state institutions. Thus, some right of access has been granted to the public and the press in every reported case in which a public university attempted to prohibit access to university presidential search records.

II. Potential Application of Public Records Laws in Other States

Although only a handful of states have resolved the issue of public access to university presidential search records through litigation, similarities in statutory language and legal interpretation of public records laws allows for limited comparison between states. Several trends emerge from the cases discussed above. First, state courts are likely to conclude that public colleges and universities meet the definition of "state agency" under their respective public records laws. Indeed, several state courts have ruled in cases related to presidential searches as well as in other cases that public institutions of higher learning are state agencies

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[49] *See* Ariz. Const. art. III.

[50] The Milwaukee Journal et. al. v. Board of Regents of the University of Wisconsin, Stipulation and Order (No. 90-CV-3524) (Oct. 25, 1991) (on file with author).

[51] Walz et. al. v. Board of Regents of the University of New Mexico, Settlement Agreement (No. 90-03600) (July 1, 1991) (on file with author).

for purposes of public records laws.[52] However, since public records laws generally apply only to "governing" or "decision-making" bodies, the court must also determine whether the public records law is applicable to subordinate units of the university, such as the board of regents or a presidential search committee. The various state statutes, and their judicial interpretations, fall into one of three categories.

In the first and most common category, public records laws apply to records produced by official bodies as part of the formal decision-making process. This type of statute attempts to balance the conflicting interests of public access and governmental privacy to protect the earliest or most sensitive stages of decision-making. Thus, courts are allowed to balance the public's interest in access against the university's interest in confidentiality. The Georgia and Texas cases discussed above illustrate this type of public records law, as do the laws of Arizona,[53] Arkansas,[54] Virginia,[55] Connecticut,[56] and West Virginia,[57] among others.

In the second category of statutes, all records of prior discussions, deliberations and actions *leading to* the decision-making process are considered public records. Florida's public records law provides an

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[52] *See, e.g.*, Lexington Herald-Leader v. The University of Kentucky Presidential Search Committee, 732 S.W.2d 884 (ky. 1987) (holding that presidential search committees are a "public agency" for purposes of access laws). *See also* The University of Kentucky v. Courier Journal, 830 S.W.2d 373 (Ky. 1992); Wood v. Marston, 442 So.2d 934 (Fla. 1983) (holding that university advisory committee met public agency definition); Booth Newspapers et. al. v. The Board of Regents of the University of Michigan, 1993 Mich. Lexis 93247 (Mich. 1993)(Board of Regents is a public body for purposes of Freedom of Information Act and open meetings laws).

[53] Ariz. Rev. Stat. § 39-121 (1993) et. seq.

[54] Ark. Code § 14-15-401 et seq.

[55] Va. Code § 42.1-76 et. seq.

[56] Conn. Gen. Stat. § 1-19(b)(1) (1992).

[57] W.Va. Code § 29-6-1 (1992).

excellent example of this liberal approach, encompassing "all state, county, and municipal records."[58] Courts applying the Florida law need only determine whether the record in question was produced by a board or commission of a state agency capable of taking official action.[59] Florida courts are not free to balance the relative significance of the public's interest in disclosure against damage to an individual resulting from disclosure.[60] Not surprisingly, in the absence of a specific exemption covering such records[61], university presidential search records in Florida traditionally have been open for public inspection. Alaska[62] and Tennessee[63] also fit into this category. Both states also conduct open presidential searches.

The final type of public records law applies only to *formal* decisions of strictly defined government agencies, and not the decision-making process itself. This type of public records law greatly restricts the public's right of access to any of the records leading to the decision made by the public body. Utah, for example, allows access only to records of final decisions of public bodies.[64] The restrictive definition of "government agency" under Pennsylvania's Right to Know Act[65] applies only to an agency that "has for

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[58] Fla. Stat. 119..01 (1) (1993).

[59] *See, e.g.*, News-Press Publishing Co. v. Gadd, 388 So.2d 276 (2 D.C.A., Fla., 1977)("all documents falling within the scope of the Public Records Law are subject to public disclosure unless specifically exempted by the legislature.")

[60] See Browning v. Walton, 351 So.2d 380 (4 D.C.A. Fla., 1977).

[61] Members of the Florida Legislature have made several unsuccessful attempts to exempt university presidential search records. *See* Florida Journal of the House of Representatives, 1983 Fla. HB 1127; 1984 Fla. HB 275; 1988 Fla. HB 234.

[62] Alas. Rev. Code 09.25.110 (1993).

[63] Tenn. Code Ann. § 10-7-101 (1993).

[64] Utah Code Ann. § 63-2-201 et. seq. (Supp. 1992).

[65] 65 Pa. Stat. 66.1-66.4 (1992).

its purpose the performance of an essential governmental function."[66] Pennsylvania courts relied upon the narrow definition of "government agency" under the public records law to rule that neither Pennsylvania State University[67] nor Temple University[68] are subject to the Right to Know Act.

Even if university presidential search records are deemed public records, the records may remain closed to the public if they fall under certain exemptions expressly enumerated in the public records law or under other state laws restricting access. North Dakota, for example, expressly exempts records of the North Dakota Board of Higher Education, which hires university presidents, from the state public records law.[69] Some public records laws contain general, or "catch-all" exemptions which might be interpreted to restrict access to university search records.[70] However, the exemptions most frequently cited in cases involving access to university records are those for personnel records and privacy.

The Personnel Matters Exemption

Many states exempt some types of personnel records from the requirements of public records laws. The rationale behind these exemptions is that disclosure of some types of personnel matters would violate

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[66] Id., § 66.1.

[67] Roy v. The Pennsylvania State University, 130 Pa. Commw. 468, 568 A.2d 751 (1990).

[68] Mooney v. Temple University Board of Trustees, 4 Pa. Commw. 392, 285 A.2d 909, *aff'd*, 448 Pa. 424, 292 A.2d 395 (1972).

[69] N.D. Cent. Code § 15-10-17 (1993).

[70] *E.g.*, Colo. Rev. Stat. § 24-72-204(1)(a) provides that if the official custodian of any public record is of the opinion that disclosure of the contents of a record otherwise subject to disclosure would do "substantial injury to the public interest," the custodian may request the district court to order disclosure restricted. *See also* Ark. Code Ann. § 25-19-105(a)-(c).

the privacy of those mentioned in the records. Indeed, personnel records in many states are exempted only if the disclosure would trigger common law privacy rights.[71] The question remains, however, whether university search records meet the definition of personnel records in most state public records laws.

Some states provide that all records and meetings concerning the appointment, employment, or discharge of any governmental employee are closed unless the employee or applicant requests deems otherwise.[72] In these states, the applicants themselves determine the status of their records. A few other states allow personnel records to be released if they do not constitute an invasion of personal privacy.[73] Still other states provide unequivocally that records pertaining to the employment, appointment or dismissal of personnel are closed.[74] The Minnesota Data Practices Act, for example, declares that the names of job applicants are private data.[75] Rhode Island's public records law exempts "all records which are identifiable to an individual applicant" for employment by the state.[76] This language appears broad enough to exempt not only records of the deliberations of university search committees, but final decisions of search committees as well.

There also exists the very real threat of new exemptions for university presidential searches and for even broader types of personnel records. As discussed above, Texas and Georgia both passed public records law exemptions limiting access to the finalists for executive searches including university

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[71] *See, e.g.*, Ark. Code Ann. § 25-19-105(b)(10) (1993); 29 Del. Code § 10002 (d)(1) (1992).

[72] E.g., Mich. Stat. Ann. § 4.1800(18) (1992); Nev. Rev. Stat. § 241.030 (1973); Ore. Rev. Stat. § 192.660(b) (1993).

[73] *See* Haw. Rev. Stat. § 92F-13(1) (Supp. 1992).

[74] *E.g.*, N.C.G.S. § 126-22 (1992).

[75] Minn. Stat. § 13.43 (3) (1993).

[76] R.I. Gen. Laws § 38-2-2 (1992).

presidencies. In 1989, the Maine Assembly enacted a provision allowing access only to the application of the individual hired.[77] Earlier this year, the Wisconsin Legislature amended the public records law to exempt all but the five finalists for public jobs.[78]

The Personal Privacy Exemption

Many states also exempt from public records statutes records likely to constitute an invasion of privacy if released.[79] Applicants for university presidencies and administrators opposed to public access to search committee records are likely to argue that release of applicant names, qualifications or other identifying material would result in an invasion of privacy. Most state courts, however, have held that to be exempted from disclosure, the records must constitute a "clearly unwarranted invasion of privacy," thus signalling that the courts will tolerate some invasions of privacy for the greater benefit of the public.[80] To determine whether such a "clearly unwarranted invasion" is likely, courts must balance the interests of the public's right to governmental information and the individual's right to privacy.

Courts likely will find a privacy interest insubstantial unless there is evidence that potential harm to a specific individual is likely to result from disclosure. The court in *Board of Regents of the University*

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[77] 34 Maine Rev. Stat. Ann. § 3003 (Supp. 1992).

[78] See ; also see Kate Culver, "Behind Closed Doors," *Quill*, October 1993, at 21.

[79] *E.g.*, the Kentucky Open Records Act exempts "public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Ky. Rev. Stat. § 61.878(1)(a). *Also see, e.g.*, Cal. Govt. Code § 6254 (West Supp. 1992); Conn. Gen. Stat. Ann. § 1-19(c) (West Cum. Supp. 1992); Mich. Stat. Ann. 4.1801(13)(1)(a) (1993); N.Y. Pub. Off. Law § 89 (McKinney Supp. 1992); W.Va. Code §29B-1-4 (1993).

[80] See Reporters Committee, supra note 3.

System of Georgia[81] rejected the Board of Regents' privacy arguments because "it is not a personal right to privacy that is urged upon us, but a corporate preference for privacy."[82] The Michigan Supreme Court in 1993 rejected similar privacy claims by the Board of Regents of the University of Michigan in granting public access to the travel expense reports of the university's presidential search committee.[83]

Courts have granted access to a variety of university records based largely on the public's right to monitor its public institutions. In each of the university presidential search cases discussed above, the court based its ruling on the need for the public to review not only the candidates involved, but the processes used to attract, evaluate and select the finalists. In each case, the public's right of access outweighed the various privacy concerns cited by the applicants or the board of regents.

Conclusion

Case law throughout the country indicates that citizens are attempting to enforce the right of access to university presidential search records. The substantial amount of agreement among these cases demonstrates the difficulty applicants and university administrators have had in convincing the courts to close university presidential searches. The prevalent arguments -- that applicants are exempted by either personnel matters or personal privacy exemptions -- have not succeeded, and are not likely to succeed in other states.

The public records law challenges to university presidential searches demonstrate that the public's right of access to the search process outweighs the privacy interests of applicants. However, several states

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[81] *Supra*, note 29.

[82] *Supra*, note 30.

[83] Booth Newspapers v. The Detroit Free Press, 1993 Mich. Lexis 2419 at 30.

have enacted legislation closing search committee records. Legislative changes to state public records laws remain a significant threat. Barring legislative changes, however, university presidential searches will continue to be a frequent source of litigation.